

IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM 1978

NO. 78-1923

LOUIS LEONARD KITCHIN, JR.,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent

---

PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

---

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Attorneys for Petitioner

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled cause on April 9, 1979 af-

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firming disqualification of petitioner's attorney.

OPINION BELOW

The opinion of the Court of Appeals, of which review is sought, is printed in Appendix A hereto, infra, p. a-1.

JURISDICTION

The judgment of the Court of Appeals was entered on April 9, 1979 and is printed in Appendix B, infra, p. b-1. The order of the Court of Appeals denying the Petition for Rehearing was entered on May 7, 1979 and is printed in Appendix C, infra, page c-1. The order of the Court of Appeals granting a stay of the issuance of the mandate pending petition for a writ of certiorari is printed in Appendix D hereto, infra, p. d-1.

The jurisdiction of this Court is

invoked under 28 U.S.C., §1254(1).

QUESTIONS PRESENTED

1. Does the mere presence as an associate in a law firm of a former Federal prosecutor who had some involvement in a criminal matter in its pre-indictment stages give rise to a reasonable possibility that some specifically identifiable impropriety did, in fact, occur where another attorney in the firm undertakes to represent the criminal defendant after the return of the indictment?

2. Does the likelihood of public suspicion resulting from the attorney's representation of the criminal defendant, under the particular facts of this case, outweigh the social interests which will be served by the attorney's continued participation in

the case?

CONSTITUTIONAL PROVISION AND  
PROCEDURAL RULE INVOLVED

The constitutional provision is that part of the Sixth Amendment to the United States Constitution which provides that, "in all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense." The procedural rule involved is Rule 19, Supreme Court Rules, the pertinent part of which reads as follows:

"Rule 19. Considerations governing review on certiorari.

"1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor.

The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons which will be considered:

"(b) Where a Court of Appeals has ... decided an important question of Federal law which has not been, but should be, settled by this court; ..."

STATEMENT

Sometime during the year 1975, the Grand Jury for the United States District Court for the Northern District of Georgia indicted Dr. Marshall Cohen on charges relating to the illegal dispensing of controlled substances or of prescriptions for controlled substances. That case was styled, The United States of America v. Marshall Cohen,

Criminal Indictment No. 75-445-A, United States District Court for the Northern District of Georgia. The Assistant United States Attorney who prepared and ultimately handled the case against Dr. Cohen was Jerry Froleich (3R.61).

In the course of pre-trial activity in the Cohen case, a motion was filed to disqualify the office of the United States Attorney for the Northern District of Georgia from prosecuting the Cohen matter based upon alleged prosecutorial misconduct. The basis of that motion was that the United States Attorney, John Stokes, had either been influenced or was subjected to influence by Louis Leonard Kitchin, Jr., who was at that time the Administrative Assistant to the U. S. Representative from

Georgia's Fifth Congressional District. Since it was possible that Mr. Froleich and Mr. Stokes might be called as witnesses at that hearing, Mr. Steven W. Ludwick was assigned to the responsibility of representing the Government's interest at the hearing on the motion to disqualify (3R.61-62). At that time, Mr. Ludwick, who had been an Assistant United States Attorney since 1974, was the Chief of the Criminal Division of the Office of the United States Attorney for the Northern District of Georgia.

In preparing for the hearing in the Cohen case, Mr. Ludwick discussed the factual evidence in connection with the charges of misconduct with the investigating FBI officer and he also reviewed the investigative files and transcripts

of tape recordings of telephone conversations between the persons allegedly involved (3R.17,38-39,61-62,77-78).

After a closed hearing before Judge Newell Edenfield on the pre-trial motion to disqualify in the Cohen case, an order was entered denying Dr. Cohen's motion (3R.62). After the hearing on Dr. Cohen's motion was denied, Mr. Ludwick had no further active contact with the Cohen case or with the factual matters upon which the motion to disqualify were based until late in the Fall of 1976, when Mr. Stokes, then the United States Attorney, indicated to Mr. Ludwick that he felt it would be appropriate to have the allegations concerning alleged wrongdoings of Mr. Kitchen resolved or otherwise disposed of. Mr. Ludwick in-

licated at that time that he thought it would be inappropriate for the Office of the United States Attorney for the Northern District of Georgia to be involved in any case against Mr. Kitchin, since that office was the object of the alleged bribery (3R.63). In order to receive independent opinions as to that fact, Mr. Ludwick requested that two other Assistant United States Attorneys review the matter and make recommendations, the result of which was that both other assistants recommended that the case not be handled by the office in the Northern District of Georgia (3R.63-65). Mr. Ludwick, along with one of the other assistants, advised Mr. Stokes of their opinions that the case not be handled by their office (3R.65-66). After that decision was

made, no further action was taken on the Kitchin matter during Mr. Ludwick's employment with the United States Attorney's office. Specifically, there was never any decision made one way or the other as to whether any indictment should be sought against Mr. Kitchin (3R.66). Since there was never a decision to indict Mr. Kitchin, Mr. Ludwick had no knowledge of any trial strategy to be employed in any case against Mr. Kitchin (3R.57).

Sometime around June or July 1977, Mr. Ludwick made a decision to leave the employment of the United States Attorney's Office, and, in accordance with that decision, he interviewed with various prospective employers, one of whom was Taylor W. Jones (3R.40). The decision to go with the Jones' firm

was made sometime between November 1977 and January 1978 (3R.41). During his discussions with Mr. Jones concerning prospective employment and prior to the commencement of his actual employment with Mr. Jones on February 6, 1978, Mr. Ludwick did not know that Mr. Jones represented, or had ever represented, Mr. Kitchin or that Mr. Jones even knew Mr. Kitchin (3R.41). Likewise, prior to that employment, Mr. Ludwick did not disclose to Mr. Jones the fact that any investigations whatsoever were pending against Mr. Kitchin (3R.41). Conversely, prior to the employment of Mr. Ludwick, Mr. Jones had no knowledge of any sort that any investigation or possible indictment was pending against Mr. Kitchin (3R.79).

The two-count indictment against Mr.

Kitchin was returned on or about May 9, 1978 (R.1-2). Shortly thereafter, Mr. Kitchin requested that Mr. Jones defend him against the charges contained in the indictment. At the time Mr. Kitchin asked Mr. Jones to represent him, Mr. Kitchin had no knowledge whatsoever that Mr. Ludwick was employed in the Jones' firm (3R.88). At the very first time he requested Mr. Jones' representation, however, Mr. Jones informed Mr. Kitchin that Mr. Ludwick was employed in the Jones' firm and that he (Mr. Ludwick) could not be involved in the case or discuss the matter with him in any way (3R.81). Mr. Kitchin understood that Mr. Ludwick was not to be involved in the case in any way, and he consented to that arrangement (3R.88).

The first knowledge that Mr. Ludwick

had that Mr. Jones represented Mr. Kitchin in various matters came on or approximately May 9 or 10, 1978 when Mr. Jones mentioned that a friend of his had been indicted and that he (Mr. Jones) would probably get a call from Mr. Kitchin because of their prior relationship (3R.43). Mr. Jones asked Mr. Ludwick the latter's opinion as to whether he (Mr. Jones) could represent the defendant in this case. After researching the matter and giving it his thought, Mr. Ludwick advised Mr. Jones that in his opinion there was no reason that Mr. Jones could not represent Mr. Kitchin, but that he (Mr. Ludwick) could not be involved in the case in any way. Messrs. Ludwick and Jones then agreed that if the latter were, in fact, called and retained in the case

that the two of them would not discuss the case in any way and that Mr. Ludwick would have absolutely no participation in the case. Mr. Ludwick testified that this agreement had been strictly adhered to at all times since its making (3R.43-45; 82).

Mr. Jones has represented Mr. Kitchin in numerous and various legal matters since 1965 (3R.83). During that period of time, Mr. Kitchin has developed a great sense of confidence in the legal skills of Mr. Jones and the two of them have developed an extremely close professional, personal, confidential and political relationship which Mr. Kitchin considers to be particularly important in the defense of his case (see entirety of Mr. Kitchin's testimony in Vol. III, pp. 82-105, with

special attention to pp. 92-99).

After Mr. Jones filed his notice of appearance as counsel in this case, the Government moved to disqualify him (R.9-11) and that motion was subsequently granted (R.92-98). From this order the defendant appealed (R.99).

REASONS FOR GRANTING THE WRIT

The issue before the Court is not whether Mr. Ludwick, the former United States Attorney, is disqualified from representing the defendant, but rather the issue is whether Mr. Jones solely because of his employment of Mr. Ludwick is so disqualified. In resolving this question, the defendant suggests that certain essential facts must be considered:

- (1) Mr. Jones has been Mr. Kitchin's attorney for thirteen

years (3R.83).

- (2) Prior to his employment by Mr. Jones, Mr. Ludwick did not know that Mr. Jones represented or even knew the defendant (3R.41).

- (3) Prior to his employment by Mr. Jones, Mr. Ludwick did not disclose to Mr. Jones the fact that any investigation whatsoever was pending against the defendant (3R.41).

- (4) Prior to the employment of Mr. Ludwick, Mr. Jones had no knowledge of any sort that any investigation or possible indictment against the defendant was pending (3R.79).

- (5) At the time the de-

fendant asked Mr. Jones to represent him in this case, he had no knowledge that Mr. Ludwick was employed by Mr. Jones (3R.88).

(6) Once Mr. Jones was asked to represent the defendant, he and Mr. Ludwick immediately agreed that Mr. Ludwick would have nothing whatsoever to do with the case and that they would not discuss the case in any way (3R.43-45; 106); further, the defendant was told of that agreement and acquiesced in same (3R.88).

In short, the evidence before the Court clearly demonstrates that the presence of Mr. Ludwick in the Jones' firm is a matter of sheer coincidence

as the same relates to this particular case. Indeed, the trial court acknowledged that fact in its order, where it says:

"There is no evidence in the record to imply that Ludwick's joining Jones' law firm or the defendant's employment of Jones was influenced by Ludwick's previous participation in the case on behalf of the government." (R.93).

Additionally, the evidence is uncontroverted that Mr. Ludwick has from the very beginning agreed to remain disassociated from the case (3R.43-45; 106), a fact also acknowledged by the trial court in its order (R.93).

The question is then quite simply whether Mr. Jones can be disqualified

from representing the defendant in this criminal case because of the mere presence in his office of Mr. Ludwick. The defendant respectfully submits that to answer that question in the affirmative is to deny this defendant his rights to the assistance of counsel without justification.

The Sixth Amendment to the Constitution of the United States provides that, "in all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense." In United States v. Anonymous, 215 F.Supp. 111 (E.D.Tenn. 1963), the District Court, citing United States v. Bergamo, 154 F.2d 31 (3d Cir. 1946), said:

"To have the assistance of counsel for his defense is

a guarantee extending to every defendant by the Sixth Amendment. This, in most situations, includes the defendant's right to counsel of his own choosing."

Similarly, the Court of Appeals, in United States v. Sheiner, 410 F.2d 337 (2d Cir. 1969), said:

"...Defendants who retain counsel have a right of constitutional dimensions to representation by counsel of their own choice ...; and that choice should not necessarily be obstructed by the Court."

Again, fairly stating the constitutional dimensions to which the right to select an attorney of one's choosing

risers, the Court of Appeals for the Second Circuit, in United States v. Armedo-Sarmiento, 524. F.2d 591 (2d Cir. 1975), said:

"Although the right to an attorney of one's choosing is not unlimited, the Sixth Amendment does give some protection to a criminal defendant's selection of retained counsel. See, United States v. Wisniewski, 478 F.2d 274, 285 (2d Cir. 1973); United States v. Sheiner, 410 F.2d 337, 342 (2d Cir.), cert. denied, 396, U.S. 825, 90 S. Ct. 68, 24 L.Ed. 2d 76 (1969); United States ex rel. Davis v. McMann, 386 F.2d 611, 618 (2d Cir. 1967), cert. denied, 390

U.S. 958, 88 S.Ct. 1049, 19 L.Ed. 2d 1153 (1968)."

The defendant acknowledges that the right to counsel of one's choosing is not an absolute right and he will not attempt to argue otherwise. He does show, however, that the right to select one's own counsel in a criminal case does rise to constitutional dimensions and that this right cannot unfairly or unnecessarily be taken from the defendant. The defendant earnestly contends that under the facts of this particular case the Court acted arbitrarily and without cause in disqualifying his attorney and that this Court should reverse that ruling.

It is agreed by both parties that to sustain the burden of its motion to disqualify Mr. Jones, the Government

must demonstrate both of the following factors of the two-prong test established by this Court, in Woods v. Covington City Bank 537 F.2d 804 (5th Cir. 1976):

(1) A reasonable possibility that some specifically identifiable impropriety did in fact occur; and

(2) a finding that the likelihood of public suspicion or obloquy outweighs the social interests which will be served by a lawyer's continued participation.

537 F.2d, at 813.

The defendant respectfully urges that the evidence before the trial court was wholly insufficient to justify a factual finding of the first factor

and that the trial court abused its discretion in finding the second factor.

As for the first factor of the Woods test, the Government must show "a reasonable possibility that some specifically identifiable impropriety did in fact occur." The defendant emphasizes the last four words of that first factor in order to distinguish the required standard from some other test which might only involve a showing that some impropriety "might have" or "could have" occurred. It is this significant distinction that the trial court and the Fifth Circuit Court of Appeals disregarded in their analysis of this matter.

There was absolutely no evidence presented to the trial court which would support the finding of a reason-

able possibility that some impropriety "did in fact occur". Rather, the trial court did no more than note Mr. Ludwick was or might be privy to certain confidential government information and that due to the "presumed interplay among lawyers who practice together" (R.96), it would be improper for Mr. Jones to represent the defendant.

The defendant knows of no legal "presumption" concerning the verbal exchanges between lawyers who practice within the same office. Moreover, since the proposed Rule 303 to the Federal Rules of Evidence dealing with presumptions in criminal cases was not enacted, it is doubtful whether any such presumption (even if it did exist in a civil context) could be utilized against the defendant in a criminal

case. In any event and without consideration of the validity of any such presumption, it is clear that the defendant's counsel rebutted the matter by testifying as to the actual absence of interplay within the office on this specific case. 1/

What then did the Government show to prove "a reasonable possibility that some specifically identifiable impropriety did in fact occur"? If one assumes that the "specifically identifiable impropriety" was the revelation of the government's secrets concerning the defendant 2/, then the only showing by

1/Mr. Ludwick testified that in any event he did not really know any confidential government strategy about the case (3R.57).

2/The trial court's order is based upon Canon 4 of the ABA Code, relating to conflicts of interests and revelations of confidences (R.95-97).

the Government in connection with that was that Mr. Ludwick is employed in the Jones' firm. The defendant suggests that the mere status of employment, without more, does not give rise to "a reasonable possibility that some specifically identifiable impropriety did in fact occur", especially where the only evidence indicates a solemn agreement otherwise (3R.43-45; 106). To conclude as a matter of fact otherwise is to convert the test from "did in fact" to "might" or "could". Even if the test was liberally amended, there would be no evidence to controvert counsel's agreement with Mr. Ludwick not to discuss the case.

The only means according to the trial court by which the Government raised the "possibility" that a wrong-

doing "did in fact occur" was through a non-existent (but in any event rebutted) "presumption of interplay". Where, as here, the constitutional rights and privileges of the defendant are at stake, such a showing is insufficient to meet the first prong of the Woods test, and the trial court erred in concluding otherwise.

Even if, contrary to the defendant's contentions, the Government made an affirmative showing of a reasonable possibility of improper professional conduct, it would still have to sustain its argument as to the second prong of the Woods test. In the twelfth footnote to the Woods case, supra, this Court said:

"We emphasize that an attorney need not be disqualified even where there is a

reasonable possibility of improper professional conduct.

As we have seen, a court must also find that the likelihood of public suspicion or obloquy outweighs the social interests which will be served by a lawyer's continued participation in a particular case. Under Canon 9, an attorney should be disqualified only when both of these standards have been satisfied."

537 F.2d, at 813.

In the recently decided case of Board of Education of the City of New York v. Nyquist, January 9, 1979, No. 78-6055, the United States Court of Appeals for the Second Circuit held that in the absence of a reasonable basis

for believing that unethical conduct may affect the outcome of a pending lawsuit, the mere appearance of impropriety "is simply too slender a reed on which to rest a disqualification except in the rarest cases". In view of the undisputed testimony of Mr. Ludwick that he knows nothing about Mr. Kitchin's case which would be of any benefit to Mr. Jones, it is difficult to understand how it could be concluded that Mr. Ludwick's employment as an associate in Mr. Jones' firm might affect the outcome of the case.

In considering the "likelihood of public suspicion", there are at least two fundamental questions which must be addressed. First, what is the "likelihood" that "the public" would be made aware of the problem of which the

Government complains? Second, having been made aware of that supposed problem, would "the public" be justifiably "suspicious"?

As to the question of "likelihood", the trial court made no effort to determine whether "the public" would or might be made aware of the alleged problem. The defendant submits that since he is to be deprived of the counsel of his choice if the decisions of the trial court and the Court of Appeals are allowed to stand, a determination of that essential fact is mandatory. Further, the defendant submits that such inquiry should go to the true question of actual (as opposed to hypothetical) "likelihood" that a real "public" (as opposed to an imaginary entity) would be made aware of the problem.

Since Mr. Ludwick will be totally disassociated with the case or the defense, it is reasonable to question the nature and likelihood of public suspicion. First, it is most likely that the only members of the public who will know that Mr. Jones is representing the defendant will be limited to those persons closely related to the trial. (i.e., It will not in all likelihood be a matter of general knowledge.) Second, those members of the public who do come to know of Mr. Jones' representation will, in all likelihood, not realize or care that Mr. Ludwick is an associate in the Jones' firm. Third, those persons who relate Mr. Ludwick to Mr. Jones will, in all likelihood, have no knowledge of Mr. Ludwick's involvement as an Assistant United States Attorney

in what the trial court referred to as the "embryonic" stage of the investigation which eventually resulted in the Kitchen indictment.

Significantly, the mere finding of a likelihood of public suspicion would, in itself, be insufficient to warrant disqualification. Rather, the Court must go further and affirmatively find that such a likelihood "outweighs the social interests which will be served by a lawyer's continued participation" in the case. See, Woods v. Covington City Bank, 537 F.2d, at 813. In the case at bar, the trial court and the Court of Appeals failed to consider all of the social interests favoring the continued representation by Mr. Jones. Instead, the Court only considered the defendant's "personal preference" and

found that to be insufficient (R.97).

The defendant submits that in considering the defendant's personal preference of attorneys as being something other than a social interest, the trial court too narrowly construed the issue. The fact that in our country one has the right to choose his own attorney is not a matter of importance only to that individual; rather, it is a matter of universal social interest, since to deprive one person of that right is to deprive an entire society of that right. The defendant's right to select Mr. Jones is more than a mere personal preference: it is the result of this society's statement of its interests as embodied in the Constitution.

A second social interest previously noted by the Court in the Woods case,

supra, at 812, is the right of Mr. Jones to freely practice his profession. While the defendant concedes that certain limitations are necessary in the exercise of that right, he suggests that such restrictions should generally arise from matters over which the disqualified attorney had or has control. As previously shown, Mr. Jones is now being disqualified as a result of the coincidence of his employment of Mr. Ludwick.

A third social interest also noted in the Woods case, supra, at 812, is the Government's need to attract skilled lawyers. By their rulings, the trial court and the Court of Appeals held that Mr. Ludwick's mere presence in the Jones' firm disqualified the latter from representing the defen-

fendant. Carried to its conclusion, that ruling means that where, as here, the former chief of criminal prosecutions leaves the United States Attorney's Office for private employment, anyone in his new office would be disqualified from accepting or continuing cases in Federal Court which had been under his supervision. Were such the rule, no such prosecutor would ever be able to sell skills in the marketplace where they could best be utilized -- criminal practice law firms, since the firm would be unwilling to sacrifice the loss of business required to hire the former prosecutor. Faced with such an employment dilemma, persons skilled in the practice of law would be reluctant to accept positions with the Government.

In sum, there are compelling social interests supporting Mr. Jones' representation in this case and the Government has made no showing that those interests are outweighed by the likelihood of public suspicion. Indeed, the Government made no showing that there was any likelihood of public suspicion. The trial court abused its discretion in disqualifying Mr. Jones and the precedent set by the affirmance of such action by the Court of Appeals is of sufficient importance to call for the issuance of a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

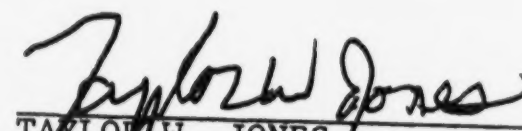
CONCLUSION

Mr. Ludwick's employment with Mr. Jones is no more than an unfortunate coincidence as the same relates to the

case at bar. The Government has failed to show that the employment has resulted in the reasonable possibility of the actual occurrence of wrongdoing and it has further failed to show that the likelihood of any public suspicion arising from the mere fact of that employment outweighs the social interests which will be served by permitting Mr. Jones to continue his representation of the defendant. Since the Government failed to sustain the various burdens set forth under the two-prong Woods test, the trial court's order disqualifying Mr. Jones should be reversed.

Respectfully submitted,

JONES, LUDWICK & MALONE

  
TAYLOR W. JONES  
Attorneys for Petitioner

CERTIFICATE OF SERVICE

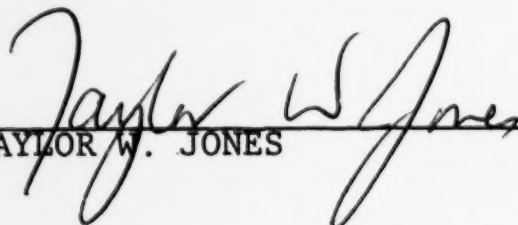
This is to certify that I am of counsel for petitioner, LOUIS L. KITCHIN, JR., and that I have this date served the within and foregoing "Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit" upon the Government of the United States of America, by depositing a copy of same in the United States mail, properly addressed, postage prepaid, to wit:

Mr. Wade H. McCree, Jr.  
Solicitor General of the United States  
Department of Justice  
Washington, D. C. 20530

and

Ms. Julie Carnes  
Assistant United States Attorney  
4th Floor United States Courthouse  
56 Forsyth Street, N. W.  
Atlanta, Georgia 30303.

This 6th day of June, 1979.

  
TAYLOR W. JONES

# **APPENDIX**

APPENDIX A

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LOUIS LEONARD KITCHIN, JR.,

Defendant-Appellant.

NO. 78-2843

Summary Calendar.\*

United States Court of Appeals

Fifth Circuit

April 9, 1979

In a prosecution for bribery of a public official and obstruction of justice, the United States District Court for the Northern District of Georgia, at Atlanta, Albert J. Henderson, Jr., Chief Judge, granted the Government's motion to disqualify defendant's attorney, and the motion of defendant's former attorney to withdraw, and defendant appealed. The Court of Appeals, adopt-

\*Rule 18, 5 Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York et al, 5 Cir., 1970, 431 F.2d 409, Part I.

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ing the findings and conclusions of the District Court, held that the public's interest in the integrity of the judicial process and in a fair but vigorous prosecution of one accused of attempting to disrupt enforcement of the criminal laws outweighed defendant's right to counsel of his choice, compelling the court to grant the Government's motion to disqualify defendant's attorney, where an associate to defendant's attorney of record had been actively involved on behalf of the United States in an early stage of this matter, where the attorney's representation of defendant would result in a "specifically identifiable" violation of ethical precepts and where it could neither be said that such attorney was the only lawyer capable of maintaining

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defendant's confidences, nor that defendant could not otherwise procure adequate representation at a reasonable cost.

Affirmed.

1. CRIMINAL LAW §641.5, 641.10(1)

Public's interest in the integrity of the judicial process and in a fair but vigorous prosecution of one accused of attempting to disrupt enforcement of the criminal laws outweighed defendant's right to counsel of his choice, compelling the court to grant the Government's motion to disqualify defendant's attorney, where, inter alia, an associate to defendant's attorney of record had been actively involved on behalf of the United States in an early stage of this matter, and where the attorney's representation of defendant would result in a "speci-

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fically identifiable" violation of ethical precepts. ABA Code of Professional Responsibility, Canon 4.

2. CRIMINAL LAW §641.10(1)

A defendant's right to counsel of his choice is not absolute and must yield to the higher interest of the effective administration of the courts.

3. CRIMINAL LAW §641.10(1)

Right of a defendant to counsel of his choice is specifically limited by the trial court's power and responsibility to regulate the conduct of attorneys who practice before it.

4. CRIMINAL LAW §641.10(1)

Determination of whether defendant's Sixth Amendment right to counsel of his choice overrides the conduct of his attorney is committed to the trial court's discretion. U.S.C.A.Const.Amend.6.

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5. CRIMINAL LAW §641.10(1)

Acts which appear to violate the ABA Code of Professional Responsibility or other accepted standards of legal ethics do not confer upon the trial court unfettered discretion to disqualify the attorney selected by a party; an attorney may be disqualified only when there is a reasonable possibility that some specifically identifiable impropriety actually occurred and, in light of the interest underlying the standards of ethics, the social need for ethical practice outweighs the party's right to counsel of his choice.

6. ATTORNEY AND CLIENT §21

A lawyer may not accept employment representing interests adverse to those of a prior client. ABA Code of Professional Responsibility, Canon 4.

## 7. ATTORNEY AND CLIENT §21

So long as the affected party can show that the matters involved in the previous representation are substantially related to those in an action in which the attorney represents an adverse party, the former client is entitled to disqualification of the lawyer. ABA Code of Professional Responsibility, Canon 4.

## 8. CRIMINAL LAW §641.5

Government, seeking disqualification of defendant's attorney of record with whom a former assistant United States Attorney had become associated, did not have to prove that the former government attorney actually obtained confidential information or that he had or would disclose it to his present employer. ABA Code of Professional Responsibility,

Canon 4.

## 9. ATTORNEY AND CLIENT §20

Public trust and the confidence with which an attorney receives potential evidence from a client would soon disappear if the lawyer were permitted to establish the same fiduciary relationship with an adverse party. ABA Code of Professional Responsibility, Canon 4.

## 10. ATTORNEY AND CLIENT §30

Given the presumed interplay among lawyers who practice together, the rule that a lawyer may not accept employment representing interests adverse to those of a prior client applies not only to individual attorneys but also requires disqualification of the entire firm as well as all employees thereof. ABA Code of Professional Responsibility, Canon 4.

## 11. CRIMINAL LAW §641.5

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For a former prosecutor to be associated with the lawyer who represents a person he earlier helped prosecute, even if only at an embryonic stage, would likely provoke suspicion and distrust of the judicial process.

12. CRIMINAL LAW §641.10(2)

Motion of defendant's former attorney to withdraw as counsel of record would be granted, in view of defendant's letter of June 5, 1978 informing the court that he had terminated that attorney's employ as of May 22, 1978. U.S. Dist. Ct. Rules N.D.Ga., Rule 71.7.

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Appeal from the United States District Court for the Northern District of Georgia.

Before AINSWORTH, GODBOLD and VANCE,  
Circuit Judges.

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PER CURIAM:

Affirmed on the basis of the findings and conclusions contained in the order of the district court which is appended hereto as an appendix.

AFFIRMED.

APPENDIX

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

UNITED STATES OF AMERICA :  
VERSUS : CRIMINAL  
: ACTION NO.  
LOUIS LEONARD KITCHIN, JR.: CR-78-144-A

O R D E R

The defendant in the above styled criminal case is charged with bribery of a public official and obstruction of justice in violation of 18 U.S.C. §§201(b) and 1503, respectively, by attempting to influence the then United States Attorney for the Northern District of Georgia,

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John Stokes, to dismiss federal criminal charges pending against Marshall Cohen. United States v. Cohen, Criminal Action No. CR-75-445-A (N.D.Ga.). Presently pending are the government's motion to disqualify the defendant's attorney, Taylor W. Jones, and the motion to withdraw of the defendant's former attorney, James Simmons.

The magistrate submitted a report and recommendation that Jones be disqualified. The court agrees but not for the reasons stated in the report and recommendation.

The defendant's alleged misconduct apparently came to light as the result of Cohen's motion to dismiss his own criminal action because of governmental misconduct or in the alternative to disqualify the United States Attorney for

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the Northern District of Georgia. Cohen charged that Stokes was influenced or subjected to influence. Judge Newell Edenfield, the presiding judge in Cohen's case, ordered a closed hearing on the matter at which Steven Ludwick, assistant United States Attorney, represented the government. In preparing for the hearing Ludwick worked with an FBI agent investigating Cohen's allegations and became aware of the defendant's role in the alleged attempt to influence Stokes. In fact, the defendant testified at the in camera hearing.

After Cohen's motions were denied, Stokes turned the matter over to Ludwick who by this time was chief of the Criminal Division. Ludwick assigned the case to another assistant United States Attorney who recommended that Stokes' of-

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fice refrain from further involvement because of potential conflicts of interest. A similar recommendation was made by still another assistant United States Attorney. At various times, Ludwick, who shared the same opinion, discussed with these assistants and Stokes the question of whether the case should be prosecuted by the United States Attorney for the Northern District in view of Stokes' posture as the target of the bribery attempt. Therefore, Ludwick was significantly involved in the development of this criminal action prior to indictment and was privy to relevant information then possessed by the government.

In February of 1978 Ludwick left the United States Attorney's office and accepted a position as an associate with

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Jones.<sup>1/</sup> This occurred three months before the present indictment was filed. There is no evidence in the record to imply that Ludwick's joining Jones' law firm or the defendant's employment of Jones was influenced by Ludwick's previous participation in the case on behalf of the government. Jones is the only attorney of record for the defendant and Ludwick states that he would not participate in the case.

(1) The issue presented by the government's motion requires a difficult balancing of a criminal defendant's right to counsel of his choice and the public's interest in the integrity of the judicial process and in a fair but vigorous prosecution of one accused of

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<sup>1/</sup>There are two other members of Jones' firm, both of whom are also associates.

attempting to disrupt the enforcement of criminal laws.<sup>2/</sup>

(2-4) A defendant's right to counsel of his choice is not absolute and must yield to the higher interest of the effective administration of the courts. Gandy v. Alabama, 569 F.2d 1318 (5th Cir. 1978). The right is specifically limited by the trial court's power and responsibility to regulate the conduct of attorneys who practice before it.

<sup>2/</sup>The government's ground for disqualification premised on Ludwick's potential status as a witness is meritless. Although the magistrate found a "substantial likelihood" that Ludwick would be called by either side, the portions of the record cited by him do not necessarily support this conclusion and, in fact, it is difficult to see how they are even relevant. At this point it cannot be said that "it is obvious" that Ludwick will be called to testify on behalf of either side. Code of Professional Responsibility of the American Bar Association (hereinafter referred to as the "ABA Code"), Disciplinary Rule 5-102.

See United States v. Dinitz, 538 F.2d 1214 (5th Cir 1976); Kremer v. Stewart, 378 F.Supp. 1195 (E.D.Pa.1974). The determination of whether the defendant's Sixth Amendment right overrides the conduct of his attorney is committed to the trial court's discretion. United States v. Dinitz, supra, at 1219.

(5) On the other hand, acts which appear to violate the ABA Code or other accepted standards of legal ethics do not confer upon the trial court unfettered discretion to disqualify the attorney selected by a party. Woods v. Covington County Bank, 537 F.2d 804 (5th Cir. 1976). An attorney may be disqualified only when there is "a reasonable possibility that some specifically identifiable impropriety" actually occurred and in light of the interests underlying

the standards of ethics, the social need for ethical practice outweighs the party's right to counsel of his choice. Id. at 810 and 813.

While the concerns expressed by the court of appeals in Woods are heightened by the fact that the defendant here is threatened with the loss of liberty, they are also tempered by the different circumstances presented in this case. In Woods, there was a technical violation of the ABA Code by the plaintiff's attorney raised, not by the potentially injured former client, but by the defendants. The court implied that the motion was prompted more by litigation tactics than a selfless interest in legal ethics. Id. at 813 and 817. In fact, the government in Woods gave every indication of condoning and encouraging the

attorney's conduct which it was felt would benefit servicemen who were former prisoners of war. Id. at 814-816. Here the conflict of interest is invoked by the party whom it most seriously affects.

Also, it was not entirely apparent from the facts in Woods that the challenged attorney violated the spirit and intent of the standards of legal ethics. Id. at 814-18. Based on the ABA Code and the case law, the same cannot be said of Jones' representation of the defendant.

(6,7) Under Canon 4 of the ABA Code and its predecessors, a lawyer may not accept employment representing interests adverse to those of a prior client. The purpose of this rule is to ensure the confidentiality of information received

in the service of a previous employer. So long as the affected party can show that the matters involved in the previous representation are substantially related to those in an action in which the attorney represents an adverse party, the former client is entitled to the disqualification of the lawyer. In re Yarn Processing Patent Validity Litigation, 530 F.2d 83 (5th Cir. 1976); American Can Co. v. Citrus Feed Co., 436 F.2d 1125 (5th Cir. 1971); United States v. Trafficante, 328 F.2d 117 (5th Cir. 1964); American Roller Co. v. Budinger, 513 F.2d 982 (3rd Cir. 1975); Hull v. Celanese Corp. 513 F.2d 568 (2nd Cir. 1975); Cord v. Smith, 338 F.2d 516 (9th Cir. 1964).

(8,9) In this case it is clear that these criteria have been met. Ludwick was actively involved on behalf of the

United States in an early stage of this matter and is now associated with the defendant's attorney. The aggrieved party need not prove that Ludwick actually obtained confidential information nor that he has or will disclose it to his present employer. In re Yarn Processing Patent Validity Litigation, supra, at 89; United States v. Trafficante, supra, at 120; American Roller Co. v. Budinger, supra, at 984; Hull v. Celanese Corp., supra, at 572. The rationale for such a rule is obvious. A close examination of information Ludwick learned while an assistant United States Attorney might well vitiate the secrecy of the communications. See Cord v. Smith, supra, at 524. In addition, public trust in the confidence with which an attorney receives potential evidence from a client

would soon disappear if the lawyer were permitted to establish the same fiduciary relationship with an adverse party. In re Yarn Processing Patent Validity Litigation, supra, at 89; American Can Co. v. Citrus Feed Co., supra, at 1128. That concern is even greater in a case involving the public's interest in the prosecution of alleged criminal acts as opposed to civil litigation.

(10) Finally, given the presumed interplay among lawyers who practice together, the rule applies not only to individual attorneys but also requires disqualification of the entire firm as well as all employees thereof. Schloetter v. Railloc of Indiana, Inc., 546 F.2d 706 (7th Cir. 1976); Cinema 5, Ltd. v. Cinerama, Inc., 528 F.2d 1384 (2nd Cir. 1976); W. E. Bassett Co. v. H. C. Cook

Co., 201 F.Supp. 821 (D.Conn.), aff'd per curiam, 302 F.2d 268 (2nd Cir. 1962); see In re Yarn Processing Patent Validity Litigation, supra, at 89; American Can Co. v. Citrus Feed Co., supra, at 1128. Thus, it does not matter that Ludwick is only an associate to the defendant's counsel of record.

Considering the state of the case law which precludes an actual examination into the content of confidences which Ludwick may have obtained or disclosed, there is no doubt that Jones' representation of the defendant would result in a "specifically identifiable" violation of ethical precepts. Woods v. Covington County Bank, supra, at 813. The remaining issue is whether the likelihood of public suspicion arising from the prohibited conduct outweighs the social in-

terest in affording a criminal defendant the right to counsel of his choice. Id. at 810 and 813, n.12.

In support of at least his own cause, the defendant makes two arguments. First he has enjoyed a long and close relationship with Jones as his attorney which has led the defendant to put a great deal of trust in Jones' discretion and ability. Because the defendant believes that some of his activities may be of a dangerous and sensitive nature and therefore relevant to his defense, he is reluctant to disclose them to anyone but Jones. However, he does not make clear how this conduct could be related to a defense but, even if so, the court cannot seriously entertain the notion that Jones is the only lawyer capable of maintaining a client's confidences.

The defendant next insists that he could not make a fee arrangement with a reputable criminal law attorney comparable to the one he now has with Jones and cannot afford any less favorable terms. Again, taking into account the many competent attorneys skilled in criminal trial practice, it would stretch the imagination to assume he could not procure adequate representation at a reasonable cost.

(11) The personal preference of the defendant for representation by Jones is insufficient to outweigh the public suspicion that would likely be aroused by denial of the government's motion. As mentioned previously, more is at stake than the confidences of a private litigant. The public has an interest in seeing that criminal laws are enforced.

For a former prosecutor to be associated with a lawyer who represents a person he earlier helped prosecute, even if only at an embryonic stage, would likely provoke suspicion and distrust of the judicial process. Moreover, the nature of the charges leveled against the defendant go to the very heart of the integrity of the prosecutor's office, particularly the idea that all persons are accountable for their criminal conduct regardless of wealth or political influence. To deny the government's motion would certainly not represent an adoption of "standards which can be imputed only to the most cynical members of the public." Woods v. Covington County Bank, supra, at 813. Consequently, society's interest in fair but unimpeded prosecution of the criminal law outweighs the

defendant's right to counsel of his choice under the circumstances of this case.

(12) There remains Simmons' motion to withdraw as counsel of record. By letter of June 5, 1978 the defendant informed the court that he had terminated Simmons' employ as of May 22, 1978. Pursuant to Rule 71.7, Local Rules for the Northern District of Georgia, the motion is granted.

Accordingly, the government's motion to disqualify and Simmons' motion to withdraw are granted. The defendant is directed to inform the clerk within thirty (30) days of the filing of this order of the name and address of new counsel. He shall then have thirty (30) days thereafter in which to file pre-trial motions.

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So ordered this the 1 day of August,  
1978.

/s/ Albert J. Henderson, Jr.  
Judge, United States District Court  
for the Northern District of Georgia.

APPENDIX B

UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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NO. 78-2843

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D.C. DOCKET NO. CR 76-C-82

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LOUIS LEONARD KITCHIN, JR.,

Defendant-Appellant.

Appeal from the United States District  
Court for the Northern District of  
Georgia.

Before AINSWORTH, GODBOLD and VANCE,  
Circuit Judges.

J U D G M E N T

This cause came on to be heard on the  
transcript of the record from the United  
States District Court for the Northern  
District of Georgia, and was taken under

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submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, affirmed.

April 9, 1979

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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78-2843

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UNITED STATES OF AMERICA,  
Plaintiff-Appellee,

versus

LOUIS LEONARD KITCHIN, JR.,  
Defendant-Appellant.

Appeal from the United States District  
Court for the Northern District of  
Georgia

ON PETITION FOR REHEARING  
(May 7, 1979)

Before AINSWORTH, GODBOLD and VANCE,  
Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is

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hereby denied.

ENTERED FOR THE COURT:

/s/ ROBERT S. VANCE  
United States Circuit Judge

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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NO. 78-2843

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UNITED STATES OF AMERICA,  
  
Plaintiff-Appellee,  
  
versus  
  
LOUIS LEONARD KITCHIN, JR.,  
  
Defendant-Appellant.

Appeal from the United States District  
Court for the Northern District of  
Georgia.

O R D E R:

The motion of Appellant for the stay  
of the issuance of the mandate pending  
petition for writ of certiorari is  
GRANTED to and including June 6, 1979,  
the stay to continue in force until the  
final disposition of the case by the Sup-  
reme Court, provided that within the per-

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iod above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

/s/ ROBERT S. VANCE  
United States Circuit Judge